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December 23, 2009

Ms. Jennifer J. Johnson
Secretary
Board of Governors of the Federal Reserve System
20th Street and Constitution Avenue, N.W.
Washington, D.C. 20551

RE: Docket No. R-1367
Regulation Z (Truth in Lending)

Dear Ms. Johnson:

This comment letter is submitted in response to proposed revisions to the open-end mortgage credit provisions of Regulation Z, applicable to so-called home equity lines of credit or HELOCs, published in the August 26, 2009 Federal Register. I submit these comments in my personal capacity only, and not on behalf of any client or colleague.

Kindly consider the following issues before finalizing the proposed HELOC-related revisions to Regulation Z:

1. Please reconsider the proposal to include optional, voluntary charges imposed for making payments by telephone or Internet as charges that are imposed as part of an open-end credit plan secured by the consumer's dwelling. Current Comment 6(a)(2)-2.x. does not treat this type of fee as a fee imposed as part of an open-end credit plan. Instead, this fee is perhaps more accurately characterized as a fee imposed in order to use a creditor's (or assignee's or servicer's) telephone or Internet expedited payment service. This type of service could potentially be made available by a creditor, assignee, or account servicer to consumers who are interested in making closed-end or open-end credit payments, payments on consumer leases subject to Regulation M, and other transactions, potentially including credit transactions that fall outside the scope of Regulation Z. This type of fee often arises only after an account has been opened (in some cases pursuant to unrelated post-closing arrangements that might be made by the original creditor or an assignee of the account with a third party servicer). This type of expedited payment service also could potentially be implemented by a creditor, assignee, or account servicer initially on a trial basis for a subgroup of consumers, to try to gauge consumer demand and to get a better sense of the costs and benefits associated with this type of service.

As long as the consumer is allowed to mail payments via regular first class U.S. mail, a consumer's decision to (for example) go directly to a third party money transmitter or use a depository bank's online bill payment service to transmit a payment should be considered a voluntary decision by the consumer to incur a payment-related charge (no different from a consumer's own case-by-case decision to pay extra for U.S. Postal Service Express Mail or other commercial overnight delivery of a payment check, or to incur a telephone or Internet expedited payment fee imposed by or through a creditor or account servicer).

(a) As mentioned above, account servicing fees (including such things as Internet or telephone payment fees) are often established and agreed to after a consumer credit contract has been consummated. Such fees are frequently the subject of an oral or written notice given to the consumer by a third party (not the original creditor) - such notice would be desirable for contract enforceability reasons. Whether this type of account servicing fee is contractually enforceable under applicable contract or other law should, however, fall outside the scope of Regulation Z – Regulation Z is generally focused on how and when to disclose certain important aspects of the consumer's contractual obligation as evidenced by the express terms of that contractual obligation (regardless of whether aspects of that contractual obligation might later on be determined to be impermissible under applicable law). See, e.g., 12 CFR Section 226.5(c) and Official Staff Comment 1 thereto.

It may also be useful to recall that the Board decided in July 2008 to <u>not</u> add a requirement to 12 CFR Section 226.36 that would have required mortgage loan servicers to provide consumers with a current schedule of servicing fees and charges within a reasonable time of request, due in part to negative public comments received from both consumer and creditor representatives.

(b) This issue would affect proposed Comment 6(a)(3)(ii)-2.iii.

(c) A side effect of excluding these types of telephone and Internet payment fees from the scope of proposed Section 226.6(a)(3)(ii) is that these types of fees would not automatically have to be disclosed under proposed revised Section 226.7 – this appears to be an appropriate result, since these types of fees are typically not "charged" or posted to a consumer's credit account, but are instead generally deducted directly from the consumer's deposit or other asset account (with appropriate disclosure of such deducted fees appearing on the consumer's Regulation E-required periodic asset account statement).

(d) Please also see item 2. of this letter, below, discussing the related issue of expedited delivery fees imposed for HELOC access devices.

2. Almost all of the issues discussed in item 1. of this letter, above, apply equally to fees imposed for expedited delivery of HELOC access devices (such as cards or loan advance request checks or drafts). Current Comment 6(a)(2)-2.ix. does not treat such fees as fees imposed as part of an open-end credit plan, provided the consumer may receive delivery of HELOC access devices without incurring a delivery charge by standard mail service (or other equivalent means). This appears to be a reasonable approach to expedited delivery fees that are only incurred at the specific request of a consumer, and that are the exception rather than the rule.

In some instances, creditors might not impose any delivery-related fees (including fees associated with obtaining the recipient's signature to confirm receipt) unless previous attempts to deliver HELOC access devices to a specific consumer have been unsuccessful. In some instances, special delivery-related fees might be imposed through the use of "C.O.D." type delivery services (so that the fee is not charged or posted to the consumer's HELOC account). As a practical matter, delivery-related fees will change over time (since creditors and their servicers inevitably use third parties for delivery services). HELOC access devices could be used (and replaced or replenished) over a period of 10 years or more. If these types of fees were to become subject to Sections 226.5b through 226.9, creditors may be effectively forced to "overdisclose" the initial dollar amount of these fees (to incorporate a cushion against third party fee increases), and may also deliberately refrain from disclosing circumstances under which these fees might be waived – such "overdisclosure" does not appear to be beneficial or useful to consumers.

3. On a matter closely related to items 1. and 2. above, it would be very useful to clarify in proposed Section 226.6(a)(3)(ii) and its accompanying Official Staff Commentary that fees falling within subsections (B) through (F) of Section 226.6(a)(3)(ii) are not "finance charges" (except to the extent proposed Section 226.4(g) (part of related rulemaking in Docket No. R-1366) specifically requires otherwise). The interplay between proposed Section 226.6(a)(3)(ii) and proposed revisions to Section 226.4 should be carefully considered, since closed-end creditors (as well as consumer lawyers and judges) may wish to continue to draw inferences from Section 226.6 concerning what types of fees are properly considered finance charges and what types of fees may be considered "other charges" (not finance charges) under Regulation Z.

4. Please also clarify in Section 226.5(d) that each consumer in a rescindable transaction should receive those *written* (or electronic) disclosures that are required to be given under Section 226.6 at or before consummation, as well as the disclosures required by Section 226.15(b). (Section 226.6 disclosures that are not required to be provided in a form the consumer may keep for future reference, and Section 226.6 disclosures that are not required to be provided at or before consummation, need not be given to each consumer with the right to rescind.)

In addition, footnote 36 to Section 226.15(a)(3) should be revised to reflect the relocation of requirements under existing Section 226.5b(d)(5)(i) and (ii) to proposed revised Section 226.5b(c)(9)(i) and (ii) and/or proposed revised Section 226.6(a)(2)(v)(A) and (B). Furthermore, for purposes of footnote 36 and existing Comment 2 to Section 226.15(a)(3), only selected aspects of proposed revised Section 226.5b(c)(9)(i) and (ii) or proposed revised Section 226.6(a)(2)(v)(A) and (B) should be considered "material disclosures" for rescission purposes. For example, the fact that the payment information might not appear in tabular format or might not be preceded by the heading required by proposed revised Section 226.5b(c)(9) or proposed revised Section 226.6(a)(2)(v) should not be considered material for rescission purposes. The focus of footnote 36 should continue to be on whether "sufficient information" (quoting from existing Comment 2 to Section 226.15(a)(3)) has been provided to allow the consumer to understand certain important payment information, not on whether all of the technical requirements of Section 226.5b(c)(9) or Section 226.6(a)(2)(v) have been met.

5. The Board has asked for comment concerning its proposed Comment 5-1. Please consider the following clarifications to proposed Comment 5-1:

(a) If a creditor opted to investigate the actual use of the mortgaged real property and ascertained that the real property was not being used as a "dwelling" by the consumer (for example, because the property is not occupied by the consumer for at least 15 days a year – see Comment 3 to 12 CFR Section 226.3(a)), then the line of credit could potentially fall outside the scope of Regulation Z due to Official Staff Comment 3 to Section 226.3(a). It would be useful to clarify that a creditor could elect to treat the HELOC as falling outside the scope of Regulation Z pursuant to Section 226.3(a) after discovering that the real property securing the HELOC is not being occupied by the consumer for at least 15 days a year. (The creditor and consumer would continue to be contractually bound by any already-agreed upon HELOC terms and conditions if, for example, the creditor discovers post-closing that the consumer is not occupying the mortgaged property.) Conversely, the creditor could choose to voluntarily continue to comply with Section 226.5b requirements, after the creditor ascertains (whether at, before, or after consummation of the HELOC) that the property securing the HELOC will not be used by the consumer as a dwelling.

It is important to note in this regard that the Commentary to Section 226.3(a) would allow a creditor to consider a HELOC as falling outside Regulation Z if both (a) the mortgaged property was not occupied by the consumer for at least 15 days a year and (b) the primary use of the HELOC has been for acquisition, improvement and/or maintenance of that mortgaged property (even if occasional incidental use of the HELOC has occurred for unrelated consumer purposes).

It is also important to note that the consumer would likely be in breach of a material obligation under the terms of the HELOC, if the consumer fails to occupy the real property for at least 15 days a year. Post-consummation, if this type of breach is discovered, a HELOC creditor will need to give serious consideration to Section 226.3(a) as a possible source of regulatory relief. This will be especially true with respect to card-accessed HELOCs, since many of the contractual provisions of a card-accessed HELOC will be incompatible with provisions of Regulation Z applicable to non-home secured consumer-purpose open-end credit card plans.

(b) If and when a creditor ascertains that the real property securing a HELOC is not a "dwelling" of the consumer, then, from that point going forward (whether at, before, or after, consummation of the HELOC), the creditor should be allowed, at its option, to cease complying with some or all Section 226.5b and related requirements (except to the extent applicable state law, including applicable contract law, might preclude the creditor from unilaterally modifying certain contractual provisions of the HELOC agreement post-consummation).

For open-end credit plans where the creditor may be effectively obligated as a matter of contract to honor a consumer's request for credit advances (unless the consumer is in default of a material obligation under the plan), the consumer's actual post-consummation use of the real property securing the open-end credit plan should be allowed (at the creditor's option) to govern whether the plan is or is not secured by the consumer's "dwelling." Thus, if (for example), at the closing of a HELOC the consumer expresses the intention of moving into the property securing the HELOC and using that property as a "dwelling," but post-closing the consumer ultimately does not move into and occupy that property as a residence for at least 15 days a year, the creditor should be allowed (at the creditor's option) to treat the plan as non-dwelling secured due to this set of changed circumstances, on a prospective basis.

For example, post-consummation, if a creditor discovers that a HELOC is not secured by the consumer's "dwelling," the creditor may at its option (unless Section 226.3(a) applies at such time) continue to follow Section 226.7 requirements for dwelling-secured HELOCs, or may at its option follow Section 226.7 requirements for non-dwelling secured open-end credit periodic statements. In addition, post-consummation, a creditor that discovers the HELOC is not secured by the consumer's "dwelling" could (unless Section 226.3(a) applies at such time) elect to continue to comply with dwelling-secured HELOC change in terms notice requirements, or could start to provide change in terms notices pursuant to the requirements applicable to non-dwelling secured open-end credit plans.

(c) Because the servicing of non-home secured and dwelling-secured consumer-purpose credit card plans (including the printing of periodic statements for such plans) is typically done by completely separate departments, divisions, or third party processors, using completely separate computer systems, HELOC creditors who choose to allow credit card access may not have appropriate hardware, software and other resources to generate periodic statements meeting the new non-home secured credit card requirements of Regulation Z after they discover the mortgaged property is not being used as the consumer's "dwelling". In addition, as noted above, contractual HELOC provisions concerning post-closing changes in terms, account freezes or suspensions, and so forth, will not be fully compatible or consistent with provisions in Section 226.9 applicable to non-home secured consumer-purpose credit card plans. Consequently, HELOC creditors that discover a certain mortgaged property is not being used as a "dwelling" by the consumer should be allowed to unilaterally terminate the consumer's continuing use of a credit card to obtain loan advances under that HELOC, and thereby unilaterally convert the HELOC to one that is no longer accessible by credit card. This would be a reasonable extension of existing Section 226.5b(f)(3)(vi) and its Official Staff Commentary, particularly since use of the mortgaged property as the consumer's "dwelling" is generally a material condition of a HELOC, the breach of which would allow the creditor to unilaterally temporarily suspend all HELOC credit privileges.

In instances where a creditor could suspend all HELOC credit privileges, the creditor should be able to terminate access to the HELOC through any or all means (e.g., cards, loan advance request checks, etc.). This should also be permissible if a creditor discovers that a HELOC is not secured by the consumer's "dwelling".

6. On a related matter, given the heightened importance of determining whether property securing a loan is or is not a "dwelling" under both Regulation Z and other unrelated federal (and state) laws (including for example the so-called S.A.F.E. Act of 2008, which expressly looks to the Regulation Z definition of "dwelling" to determine whether a loan is subject to that Act), please clarify in Comment 2 to Section 226.2(a)(19) that property is a "dwelling" only if the property is used as a residence *by the consumer* (as opposed to a third party, such as a tenant of the consumer). This clarification would be consistent with Comment 1 to Section 226.2(a)(19), Comment 3 to Section 226.3(a), and case law.

7. Concerning proposed Comment 5b(c)(16)–1 and proposed Comment 6(a)(2)(xvii):

(a) Please clarify that creditors do not have to disclose "point of purchase" (point of sale) limitations that might apply due to card processing, card authorization and related requirements if a card is used to finance the purchase of, or otherwise obtain, goods or services from a third party pursuant to a HELOC. For example, antifraud- and security-related restrictions pertaining to the dollar amount of a card transaction (or the cumulative amount of card transactions) processed on a given day (or a given business day or a given 24-hour time period), or security-related restrictions limiting the number of card transactions that may be processed on a day, should not need to be disclosed if the card is not the only means by which the consumer may request and obtain HELOC advances.

15 USC Section 1637A(a)(12)(A) requires disclosing any "limitation *contained in the plan* on the number of extensions of credit and the amount of credit which may be obtained during any month or other defined time period." (emphasis added) The statute appears to be focused on restrictions and

limitations applicable to access to the plan as a whole, viewed in its entirety, as opposed to restrictions and limitations that might apply to access to a specific aspect of the plan (such as access to the plan through use of a card). Antifraud and security restrictions (whether imposed by unaffiliated third party network processors or by creditors directly) are not limitations "contained in the plan," if the creditor would have been willing to make the requested extension of credit but for either (a) the application of a card transaction authorization system that results in refusal to authorize the requested card transaction, or (b) the creditor's inability to reasonably rule out possible fraud or other impropriety with respect to the requested card transaction.

This distinction between antifraud and security measures used to decide whether to approve an individual loan advance request, and dollar or frequency restrictions on valid, legitimate and verified (approved) loan advance requests, would also be consistent with proposed 12 CFR Section 226.6(a)(2)(xiv)(A), which requires disclosure of creditor-imposed fees the consumer would incur if the consumer fails to comply with "limitations on the number of extensions of credit or the amount of credit that may be obtained during any time period." A consumer's inability to meet specific loan advance verification or authorization requirements would not typically trigger a creditor-imposed fee.

By way of example, creditors and/or third party card processing networks typically impose security-related restrictions on card transactions, including without limitation card transactions at automated teller machines, point of sale terminals, and Internet or telephone card transactions. These security-related restrictions may change over time as fraud prevention and detection systems are improved and enhanced. These changes are sometimes outside the control of the HELOC creditor. Whether within or outside the control of the creditor, these changes should not be disclosed to the public for security reasons.

If the consumer has other non-card related means of requesting and obtaining a desired HELOC advance (so that the card is not the sole means of requesting or obtaining a HELOC loan advance), detailed disclosure of security-related transaction limitations applicable only to the card would also potentially overshadow more significant HELOC advance transaction limitations applicable to any loan advance requested under the plan (regardless of the manner in which the request is received) that are imposed directly by (and under the control of) the HELOC creditor.

(b) On a related matter: The creditor's own antifraud and security-related procedures may occasionally delay the creditor's processing of a requested loan advance (to give the creditor time to verify that the advance has actually been requested by an authorized consumer and not an imposter). This also is not a transaction requirement or limitation that needs to be disclosed to consumers under Section 1637A(a)(12)(A), since it should go without saying that a creditor may verify the authenticity and legitimacy of a loan advance request before going ahead and making the requested advance – verifying such authenticity and legitimacy is not a restriction on the loan advance itself, it is instead part of the process of deciding whether a loan advance has in fact been requested by an authorized consumer for lawful purposes. From time to time, if a creditor is unsure whether a loan advance request is legitimate, the creditor may refuse to honor the request – that should not be considered a limitation "contained in the plan" on the consumer's ability to receive loan advances. Instead, this is the creditor's way of determining whether the loan advance request should be entertained (whether the request indeed falls within the scope of the "plan"). In other words, this is more akin to "underwriting" a requested loan advance (and the pre-existing Commentary to Section 226.5b(a)(1) indicates that a Section 226.5b application disclosure should not discuss the creditor's underwriting criteria). Furthermore, disclosure of a creditor's internal antifraud and security-related procedures for verifying the authenticity and legitimacy of a loan advance request would increase the risk of fraud and thus be counter-productive.

(c) A HELOC creditor's loan advance request processing and authorization requirements (including restrictions aimed at reducing the risk of fraudulent or unauthorized transactions) could be regarded as conditions precedent to determining whether a requested loan advance is legitimate and coming from an authorized consumer, even if such requirements will result in certain loan advance requests being denied. Loan advances requested by credit card are especially susceptible to fraud and therefore more likely to be subject to stringent (and changing) antifraud and security measures. If a consumer has other non-card related means of requesting the desired loan advance, the fact that a HELOC creditor might not allow the desired loan advance requested with a card at that particular time should not, by itself, be considered a transaction restriction that triggers the disclosure requirement of 15 USC Section 1637A(a)(12)(A), provided the card is not the consumer's only means of accessing the HELOC.

(d) A corollary to the above is that a change to antifraud or security measures used to help determine the legitimacy and authenticity of a loan advance request, or used to help reduce the risk of fraudulent or unauthorized loan advance requests, should not be considered a change subject to the change in terms provisions of 12 CFR Section 226.5b(f) or Section 226.9(c).

It would be very useful if these issues could be clarified in the revised Official Staff Commentary.

8. The Board has asked for comment concerning an appropriate implementation timeframe for the proposed Regulation Z HELOC-related revisions. Given the large number of non-home secured open-end credit card related changes that will be taking effect during 2010 (as well as changes to closed-end credit disclosure requirements, such as new RESPA requirements and pending proposed closed-end mortgage credit revisions to Regulation Z), the mandatory effective date should not be any earlier than October 1, 2011 (assuming the Regulation Z HELOC-related revisions are finalized and published in the first half of 2010). An effective date in 20**12** would potentially allow for a supplemental round of rulemaking to clarify certain still-outstanding compliance details (analogous to the supplemental credit card rulemaking proposed by the Board in May 2009 as part of Docket No. R-1286) after the pending proposed revisions are finalized. None of the final revisions should apply to HELOCs applied for before the mandatory effective date (although HELOC creditors could be allowed, at their option, to comply early with some or all of the revisions - for example, creditors could elect to comply early with the periodic statement and/or change in terms revisions, while continuing to follow pre-existing requirements for application and account-opening disclosures, or vice versa).

Thank you very much for the opportunity to present these comments. Please do not hesitate to contact me at (203) 776-1911 during regular business hours (Eastern Time) if you have any questions about any of the matters discussed in this letter or would like any further information.

Sincerely,
/s/ *Elizabeth C. Yen*
Elizabeth C. Yen
(admitted in Connecticut only)